No. 1193

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

STATE OF WISCONSIN EX REL. JOHN C. RIZZO,
Petitioner,

VS.

THE COUNTY COURT OF KENOSHA COUNTY BRANCH II, THE HONORABLE EARL MORTON, JUDGE OF SAID COURT PRESIDING THEREIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dominic H. Frinzi, on behalf of John C. Rizzo, respectfully petitions this honorable Court for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Wisconsin, entered in the above entitled case on November 29, 1966, and reaffirmed on rehearing on January 31, 1967.

OPINIONS BELOW

The memorandum opinion of the Circuit Court of Kenosha County, Wisconsin (R. 13-16), is unreported and is printed in Appendix B hereto, *infra*, pp. App. 2-6. The opinion of the Supreme Court of the State of Wisconsin printed in Appendix B hereto, *infra* pp. App. 8-16, is reported in 32 Wis. (2d) 642, (R. 118-127). The opinion of the Supreme Court of the State of Wisconsin on rehearing printed in Appendix B hereto, *infra*, p. App. 21 is reported in 32 Wis. (2d) 642 (R. 130).

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on November 29, 1966. (Appendix B, *infra* p. App. 7), (R. 117). A timely petition for rehearing was filed on December 14, 1966 (Appendix B, *infra* p. App. 17 was denied on January 31, 1967. (Appendix B, *infra*, p. App. 20), (R. 129).

The jurisdiction of this honorable Court is invoked under 28 U. S. C. Section 1257(3).

HOW FEDERAL QUESTION IS PRESENTED

The Federal Question was presented in the court of first instance by way of a Petition for a Writ of Prohibition from the Circuit Court of Kenosha County to the County Court of Kenosha County, Wisconsin. The denial of said petition in the court of first instance was appealed to the Supreme Court of the State of Wisconsin, which Court affirmed the order of the court of first instance. The order of the Supreme Court of the State of Wisconsin is the highest Court in that State, in which decision on that case could be had.

QUESTIONS PRESENTED

A. Was the petitioner denied his rights under the Fifth Amendment of the United States Constitution, when he was compelled, under a grant of immunity, to testify concerning past gambling activities in one county in the State of Wisconsin, and was then charged with a violation of the state gambling laws in another county of the State of Wisconsin, which crime was allegedly committed prior to the time of his compelled testimony?

B. Where an individual is compelled to testify under a state grant of immunity, and testifies concerning past gambling activities, does the individual have the burden of establishing in court that the compelled testimony may have or did furnish a link in a chain of evidence which could be used against him in a state prosecution for violating a gambling law?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Statute involved in this petition is: Wis. Stats. 885.34. This statute is set forth in Appendix A, *infra*, p. App. 1. The Constitutional provision involved is the Fifth Amendment of the United States Constitution, which states as follows:

> "Article V, No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF CASE

Petitioner, John C. Rizzo, was subpoenaed to appear in the City of Kenosha, Wisconsin, before the Honorable Harry V. Carlson, County Judge, Branch No. 2, acting as a Magistrate in conducting "John Doe" investigation, pursuant to Section 954.025 of the Wisconsin Statutes. The investigation consisted of examination under oath of the petitioner in secret, although from time to time the petitioner was permitted to leave the interrogation room and confer with counsel. The Magistrate was assisted in the interrogation by an Assistant Attorney General of the State of Wisconsin. During the interrogation, the petitioner claimed his privilege under the Fifth Amendment to the United States Constitution. (R. 24, 25 & 26; Appendix C, *infra*, p. App. 22).

The petitioner was ordered to appear before said Honorable Harry V. Carlson, in his capacity as County Judge. At said hearing on October 13, 1964 the Assistant Attorney General requested that the petitioner be granted immunity from prosecution, pursuant to Section 885.34 of the Wisconsin Statutes and moved the Court to grant immunity on the following three questions:

(1) "Did you ever have any connections with the Ogden Social Club in Milwaukee?"

(2) "Did you ever pay any money to Milwaukee police officials to operate the Ogden Social Club?"

(3) "Whether you had any knowledge regarding the murder of Tony Biernat?"

The petitioner was represented by counsel at said hearing. (R. 54, 55; Appendix C, *infra*, p. App. 23).

During the course of these proceedings, the attorneys for the appellant objected to the compulsion of testimony as to

the first two questions on the ground that the questions did not concern themselves with Kenosha County and would be remote to any investigation in that County. To this contention Mr. Dalton, an Assistant Attorney General, informed the Court that he did not feel that he was required to establish the connection "at this point." He also advised the Court that "during the investigation many things come up which relate to the activities in the county where the investigation is taking place." (R. 56, 57; Appendix C, *infra,* p. App. 23). The Court, in overruling the position taken by the appellant, stated: "But questions may relate to Salt Lake City before this particular proceeding in Kenosha County and that, as long as it is connected with the investigation in the John Doe proceeding." (R. 58; Appendix C, *infra,* p. App. 24).

The attorneys for the appellant further contended that in the event appellant was compelled to testify, that he be granted general immunity regarding any question answered relating to the subject matter. Mr. Dalton objected on the ground that immunity could only relate to the three questions under discussion and to nothing else. (R. 57, Appendix C, *infra,* p. App. 24). The Court stated that it would grant immunity on the *subject matter* of a particular question. The Court ruled that the witness could be asked questions which it described as "supplementary questions" dealing with the particular subject. (R. 59; Appendix C, *infra,* p. App. 24).

Immediately after said hearing, appellant was questioned in secret session in the absence of his counsel. During said interrogation, appellant admitted that he gambled in a gambling place known as the Ogden Club more than six

years ago. (R. 28, 29; Appendix C, *infra*, p. App. 24). He admitted that he gambled, that at the Ogden Club he had worked as a "stick man", and that to his knowledge a fellow named "Maurie" managed the club. (R. 30; Appendix C, *infra*, p. App. 25). He admitted that he knew one "Frank Balistreri", "Phil Alderisio", "'Wheezer' Covelli", and "Joe Gags." (R. 33, 34, 36, 37, 38, 39 and 48; Appendix C, *infra*, p. App. 25).

Petitioner alleged on information and belief that the records of the County Court, Branch II, Kenosha County, will indicate that the said "Wheezer Covelli" was granted immunity during the course of this investigation regarding activities in the City of Kenosha.

Thereafter, upon the completion of the John Doe proceedings on August 5, 1965, the said Honorable Harry V. Carlson, sitting as a Magistrate, issued a warrant for the arrest of the appellant, which charged a violation of Sec. 945.03 (1) of the Wisconsin Statutes, which charges the petitioner with having engaged in illegal gambling in Kenosha County. (R. 14; Appendix B, *infra*, p. App. 3).

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of the State of Wisconsin appears to be in conflict with several decisions of the United States Supreme Court. These decisions will be discussed later. The decision of the Supreme Court of the State of Wisconsin appears to establish rules of procedure that for all intents and purposes completely subvert the protection of the Fifth Amendment of the United States Constitution.

In the first place, the decision indicates that there is no apparent connection between gambling in one county of a state, as opposed to gambling in another county of the same state. The decision indicates this as a matter of law, and is in conflict with *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2nd 653.

The Court in the majority opinion states the burden of establishing a link in a chain of evidence which could lead to the petitioner, is imposed upon the witness. The burden of proving such a nexus is imposed upon the witness in the Trial Court. This rule is in conflict with *Counselman* v. *Hitchcock* (1892), 142 U.S. 547, 585, 12 Sup. Ct. 195, 35 L. Ed. 1110, which states:

> "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. . . ."
>
> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."

It is significant that prior to the grant of immunity, the petitioner is under no obligation to discuss his past gambling activities with anyone. After the grant of immunity he is then placed in a position where he is given an affirmative burden of proof to establish that the compelled testimony could furnish a link in evidence which would result in his conviction. It is obvious the only manner the petitioner could affirmatively establish that the compelled testimony resulted in a link of evidence, would be for him to admit the offense. The use of the immunity device in this fashion certainly does not grant the petitioner a co-extensive protection that he possesses under the Fifth Amendment.

The Wisconsin Supreme Court further states the immunity device is "an aid in the prosecution of criminals". This view is in direct conflict with *Brown* v. *Walker* (1896), 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819, which holds, "The act of Congress in question, securing to witnesses immunity from prosecution is virtually an act of general amnesty".

The view of the Wisconsin Supreme Court may have some merit in the event the State of Wisconsin attempted to use petitioner's testimony against another person.

Since the petitioner himself is the defendant, it is clear the rationale of *Brown* v. *Walker,* supra, applies to the use of the immunity device in the instant case.

The decision of the Wisconsin Supreme Court completely ignores the conduct of the State of Wisconsin in the manner in which the immunity device was employed in the instant case. Over the objection of counsel for the petitioner, the record indicates that on the one hand the State of Wisconsin represents to one Court of Record that the requested

testimony was pertinent to its investigation. On the other hand, after obtaining petitioner's compelled testimony, the State of Wisconsin represents before another Court of Record that this testimony is not pertinent to the charge of gambling against the petitioner. The charge of gambling evolved directly from the said investigation. Repeated and continued conduct of this type on the part of the State makes a sham of the Fifth Amendment to the United States Constitution and the protection afforded an individual under a grant of State immunity. The Wisconsin Supreme Court decision places all of the burden on the witness or defendant and none whatsoever on the State, notwithstanding the inconsistent positions of the State before two different Courts of Record regarding the same evidence compelled from the petitioner.

CONCLUSION

For the foregoing reasons it is submitted that this petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The Statute involved in this petition is: Wis. Stats. 885.34 which states as follows:

Incriminating testimony compelled; immunity.

Whenever any person shall refuse to testify or to produce books, papers or documents when required to do so in any criminal examination, hearing or prosecution for the reason that the testimony or evidence required of him may tend to criminate him or subject him to a forfeiture or penalty, he may nevertheless be compelled to testify or produce such evidence by order of the court on motion of the district attorney. But no person who testifies or produces evidence in obedience to the command of the court in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence; but no person shall be exempted from prosecution and punishment for perjury committed in so testifying.

APPENDIX B

DECISION ON WRIT OF PROHIBITION

State Of Wisconsin Ex Rel. John C. Rizzo,

Petitioner

vs.

The County Court Of Kenosha County Branch II, The Honorable Earl Morton, Judge Of Said Court Presiding Therein,

Respondent.

Honorable H. Eugene Baker
Circuit Judge, Presiding
Kenosha, Wisconsin
November 29, 1965

The Court: John C. Rizzo was subpoenaed to testify before a magistrate in Kenosha County in a John Doe proceeding. He invoked the 5th Amendment in reply to various questions asked of him. Thereupon the prosecutor pursuant to the holding in *Jackson* v. *Coffey,* 18 Wis. 2nd 529, appeared before the County Court, Branch 2, of Kenosha County, and moved the Court to grant to the witness immunity under Sec. 325.34 as to the following three certified questions:

(1) Did you ever have any connection with the Ogden Social Club in Milwaukee?

(2) Did you ever pay any money to Milwaukee police officials to operate the Ogden Social Club?

(3) Do you have any knowledge regarding the murder of Tony Biernat?

Immunity was granted by the Court as to the three questions. Thereafter the witness returned to the John Doe hearing and gave answers to the three questions and other questions related to such three questions. This Court has had the opportunity to read the entire examination in the John Doe proceeding, having ordered the prosecutor to produce it that the Court might see it and that defense counsel might see it solely for the purposes of this proceeding. Except for such purposes the testimony has remained sealed. In passing on to the principal question raised by these proceedings the Court may state unequivocally without discussing the nature of the questions that it appears from the record that Mr. Rizzo was not misled into testifying as to other matters under the belief that he would be granted immunity with respect to such other matters.

Upon the completion of the John Doe hearings the magistrate on August 5th, 1965, issued a warrant for the arrest of John C. Rizzo, charging him with a violation of Sec. 945.03 (1) of the Wisconsin Statutes in the City of Kenosha between January 1st 1960, through January 28th, 1963. Sec. 945.03 is the commercial gambling statute. Mr. Rizzo seeks a Writ of Prohibition against Kenosha County Court, Branch 2, Hon. Earl Morton, presiding judge, to prevent the Court from conducting a preliminary examination under the warrant.

It is the position of the Relator that having been given immunity as to three specific questions and any questions supplementary thereto the Relator is entitled as a matter of law to be free from any prosecution, at least in the field of gambling charges. Apparently the position taken is based upon the proposition that any immunity statute to be constitutional must be as broad as the privilege

against self incrimination under the 5th Amendment which, of course, was the holding in *Counselman* v. *Hitchcock*, 35 Lawyers Edition, 1110. The Wisconsin statute in question complies with the principle laid down in the *Counselman* case. The Relator urges therefore that the fact that there was elicited from the Relator following the granting of immunity his acquaintanceship with other men known to be involved in gambling activities and to the fact that in the past he, himself, had engaged in gambling activities and had been a "stick man" in a gambling house in Milwaukee "could certainly furnish links in a chain of evidence which *might* involve the witness in recent gambling activities." Hence it is urged that this Court should absolutely forbid the prosecution of the Relator under the August, 1965, warrant which relates itself to gambling activities in Kenosha County.

One of the questions that arises in this entire proceeding is whether or not the procedure of a Writ of Prohibition is a proper remedy to reach the points that the Relator sets forth in his argument. However, this point has not been briefed by counsel nor was such a brief on such point requested by the Court because in the view this Court takes a decision upon that point has become unnecessary. Nevertheless, in passing to the gist of the Court's decision it must be pointed out that most of the so-called revelations obtained from the Relator were not given in answer to any of the certified questions or any questions supplementary thereto. Many of the answers were given by the witness after he was specifically advised in the John Doe hearing that the questions about to be asked were not under the immunity and that he had a right to invoke his constitutional privilege if he believed that his answers might incriminate him. Therefor, as to such questions and answers,—if they were to

play any role of relevancy and materiality of evidence in the prosecution under the present warrant—there would in any event be no immunity where the privilege had not been claimed. *State* v. *Grosnickle,* 189 Wis. 17; *United States* v. *Murdock,* 76 Lawyers Edition 210. Since, then, there must be at some point in the trial or at the preliminary examination a determination of whether or not an answer was pursuant to immunity or not a determination can hardly be made upon a Writ of Prohibition. It would seem that the more proper way would be a Plea in Bar upon arraignment following the preliminary and this suggestion may be found in both the State and Federal cases.

However, the Relator cites language from *Brown* v. *Walker,* 40 Lawyers Edition, 591, that immunity statutes are virtually an act of general amnesty. This is not the law today. The immunity statute is recognized as a weapon for proper law enforcement and not merely a protection of the criminal. See *Carchidi* v. *State,* 187 Wis. 438; *Brown* v. *Walker,* supra. See also *Murphy* v. *Waterfront Commission of N. Y.,* decided by the U. S. Supreme Court June 15th, 1964, where this fact though dictum is still given expression. Relator is correct that under *Hoffman* v. *U. S.,* 95 Law Edition, 1118, the privilege of the 5th Amendment extends not only to answers that would in themselves support a conviction but also covers any answer that form a link in the chain of proof needed to prosecute the petitioner for a crime and hence the immunity statute must be just as broad. Mr. Rizzo, through his counsel, urges that the fact (elicited on the John Doe examination) he knew persons who were generally known to be gamblers and the fact that he himself had gambled in Milwaukee might possibly be used as evi-

dence against him in a Kenosha proceeding. Therefore, the immunity he did receive would be worthless because he would still be subject to trial and a danger of conviction from the use of those facts. The answer to this argument is two-fold: first, as stated before, those facts became known by reasons of answers to questions which were not within the immunity granted; secondly, these facts would appear to be clearly irrelevant and immaterial in a trial on the warrant issued in this case and would probably be ruled inadmissible. Hence the argument is based on a sheer speculation against which Mr. Rizzo is not entitled to the protection of the law.

There has been no showing to support the issuance of a Writ of Prohibition against Kenosha County Court, Branch 2. This Court does not suggest that the Relator may not raise the issue in his preliminary examination or in his trial at a proper time if the proof indicates that the rights accorded to him in the grant of immunity have been abused. All this Court can and does now say is that there is no showing sufficient to support the issuance of the Writ of Prohibition and the same is therefore quashed.

M. Eugene Baker
Circuit Judge

Dated November 29th, 1965.

And afterwards, to-wit on the 29th day of November, A. D. 1966, the same being the 48th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

State ex rel. John C. Rizzo,

Appellant,

vs.

The County Court of Kenosha County, Branch II, the Hon. Earl Morton, Judge of said court presiding therein,

Respondent.

OPINION BY JUSTICE HANLEY

This cause came on to be heard on appeal from the order of the Circuit Court for Kenosha County and was argued by counsel. On consideration whereof, it is nowhere ordered and adjudged by this Court, that the order of the Circuit Court for Kenosha County herein be, and the same is hereby affirmed.

Justices Gordon, Beilfuss and Heffernan concur.

No. 122

August Term, 1966

State Of Wisconsin: In Supreme Court

State ex rel. John C. Rizzo,

Appellant,

vs.

The County Court of Kenosha Co., Branch II, the Hon. Earl Morton, Judge of said Court Presiding Therein,

Respondent.

Appeal from an order of the circuit Court for Kenosha county: M. Eugene Baker, Circuit Judge. *Affirmed.*

This is an appeal from an order dated December 30, 1965, which denied a writ of prohibition sought against the respondent and which granted a writ of consultation ordering the respondent to proceed in the action of the *State of Wisconsin* v. *John C. Rizzo,* being an action in the county court of Kenosha county.

John Rizzo was subpoenaed to testify before a magistrate in a Kenosha county John Doe proceeding pursuant to sec. 954.025, Stats. He invoked the Fifth Amendment in reply to various questions asked of him. The prosecutor, pursuant to the directions in *State ex rel. Jackson* v. *Coffey* (1963), 18 Wis. (2d) 529, 118 N.W. (2d) 939, appeared before the county court, Branch 2, of Kenosha county, and moved the court to compel the witness to testify under sec. 325.34, Stats. (sec. 885.34, 1965 Stats.), as to the following three certified questions:

(1) Did you ever have any connection with the Ogden Social Club in Milwaukee?

(2) Did you ever pay any money to Milwaukee police officials to operate the Ogden Social Club?

(3) Do you have any knowledge regarding the murder of Tony Biernat?

The court compelled the witness to testify as to the above three questions. Thereafter the witness returned to the John Doe hearing and gave answers to the three questions and other questions related to such three questions.

The trial court read the entire examination in the John Doe proceeding and stated that it appeared from the record that Mr. Rizzo was not misled into testifying as to other matters under the belief that he would be granted immunity with respect to such other matters.

Upon the completion of the John Doe hearings, the magistrate, on August 5, 1965, issued a warrant for the arrest of John C. Rizzo, charging him with a violation of sec. 945.03 (1) Stats., in the city of Kenosha, between January 1, 1960 through January 28, 1963. Section 945.03, Stats., is the commercial gambling statute. Mr. Rizzo seeks a writ of prohibition against the county court from conducting a preliminary examination under the warrant.

HANLEY, J. The following issue is raised on this appeal:

Where the relator has answered under the compulsion of a court order, pursuant to sec. 885.34, Stats., questions relating to pre-1959 gambling activities in Milwaukee county, will prohibition lie to prevent prosecution of the relator for gambling in Kenosha county after 1959?

The relator contends that, having been compelled to testify as to the three specific questions and any questions supplementary thereto, he is entitled as a matter of law to be free from any prosecution on any charges of gambling.

Statutory procedures which allow testimony to be compelled by court order and which grant immunity from prosecution to the witness so testifying are based on the theory of *quid pro quo*. In exchange for information that a prosecutor could not otherwise obtain, the witness receives immunity from prosecution for the crimes to which his testimony relates. The statute merely creates an immunity coextensive with the constitutional privilege against self-incrimination. 8 Wigmore, Evidence (McNaughton rev. 1961) 512-513, sec. 2282. *State* v. *Davidson* (1943), 242 Wis. 406, 409, 8 N.W. (2d) 275.

The basic principles with regard to the immunity of a witness who has been compelled to divulge incriminating statements were made explicit in the landmark case of *State* v. *Murphy* (1906), 128 Wis. 201, 219, 107 N.W. 470 (Opinion of Marshall, J.). In independent opinions, Mr. Justice Marshall and Mr. Justice Winslow articulated the fundamental rules:

> "(1) The statute does not wipe out the offense about which the witness might have refused to answer. It creates a bar to a prosecution for the offense. The offense with its attendant moral turpitude is left just the same, but by force of the statute the public is remediless.
>
> (2) The statute is not broader than the constitutional guaranty for which it was intended to be a 'substitute.' The very idea of a substitute suggests the limitation of one as that of the other. In

other words, that they are equivalents, one being exchanged, by force of the law, for the other.

"(3) The statute does not immune because of evidence given other than that of self-incriminatory character; such as without the statute would be obscured by the constitutional privilege of silence.

"(4) For the statute to operate there must be evidence under real compulsion, not mere right of compulsion. . . .

"(5) . . . In other words, the law contemplates only a situation as regards an event, whether denominated a transaction, a matter, or a thing, where, under the constitutional privilege of silence, the person compulsorily called to testify might refuse to speak, but for removal of the precise danger which such privilege was designed to shield him from. So the statute becomes active whenever and wherever the constitutional privilege would otherwise operate; and its activity ceases when that would otherwise not intervene. It is a substitute, and that only." 128 Wis. at pp. 219-220 (Opinion of Marshall, J.)

Mr. Justice Winslow went on to explain:

". . . In my judgment the immunity statute is as broad as the privilege which it was passed to obviate, and no broader. In order to gain the immunity the witness must, in my opinion, be *compelled* to testify. He could waive his constitutional privilege by testifying voluntarily, he can likewise waive his statutory immunity by doing the same thing. I do not think that compelling a person to appear by subpoena can properly be considered as compelling him to testify. It was not so considered with regard to the constitutional guaranty. A person might be compelled by subpoena to attend, but might testify voluntarily when so in attendance, and thus waive his privilege. In like manner I think he may waive his

immunity. Otherwise the statute becomes a snare to the prosecutor and a means of avoiding the just consequences of crime. I do not mean by this that it is necessary for the witness to refuse to answer, but simply that he should make known the fact that he does not testify voluntarily but only in obedience to the command of the law and the court. When this has been done he gains immunity from prosecution on account of the transaction or matter concerning which he testifies, and not before.

"In this case, therefore, I think there was no immunity on two grounds: First, because the defendant testified voluntarily before the grand jury; he was not compelled to testify. Second, because he did not give any testimony concerning the transaction or thing for which he is now being prosecuted." 128 Wis. at pp. 221-222 (Opinion, Winslow, J.)

The principles enunciated by Justices Marshall and Winslow were explicitly approved by a unanimous court in *Carchidi* v. *State,* (1925), 187 Wis. 438, 442-443, 204 N.W. 473. The approach taken by the Wisconsin supreme court with regard to an immunity statute was previously held not to violate federal constitutional privilege against self-incrimination. *Brown* v. *Walker* (1896), 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819.

Thus basically a witness will be immune from prosecution as to those offenses about which he testified if (1) he was actually compelled to testify under the statute, and (2) the testimony that he divulged while under compulsion is part of or led to evidence which supports the prosecution from which he claims immunity. Under sec. 885.34, Stats., there is the additional requirement that a witness will receive immunity only if compelled to testify "by order of the court upon motion of the dis-

trict attorney." In *State ex rel. Jackson* v. *Coffey,* supra, this court held that "order of the court" in the statute means an order issued from an open court sitting as such, not only by a judge sitting as magistrate in a John Doe proceeding.

In application the basic requirements for immunity outlined above have been explained by the following complementary principles:

(1) The witness must claim his privilege against self-incrimination as a condition to any immunity under the predecessor to sec. 885.34, Stats. *State* v. *Davidson,* supra.

(2) A witness who testifies without objection to questions which elicit incriminating testimony thereby waives his privilege and is not entitled to immunity from prosecution based on such testimony. *State* v. *Grosnickle* (1926), 189 Wis. 17, 26, 206 N.W. 895.

(3) A witness has no right to claim the privilege where his answers could not be used as a basis for, or in aid of, a prosecution against him. *Brown* v. *Walker,* supra.

(4) "A matter is incriminating or tends to incriminate whenever, in the probable operation of law or the ordinary happening of events, there would be reasonable grounds to apprehend dangers to the witness from his being compelled to answer questions about which he has particular personal knowledge." Maloney, "A Code of Evidence for Wisconsin—Self-Incrimination," 1946 Wis. L. Rev. 147, 155.

(5) "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant. . . . To sustain the privilege, it need only be evident from the implications of the question,

in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *U. S.* (1951), 341 U.S. 479, 486-487, 71 S. Ct. 814, 95 L. Ed. 1118.

(6) Where a defendant claims that prosecution is barred because testimony he gave under compulsion after claiming his privilege is being used as a link in the chain of evidence needed to prosecute him, and where this claimed link is not evident or probable from the fact of the criminal pleadings and the testimony given under compulsion, the burden is on the defendant to show that the evidence against him was obtained by means of his testimony. *State* v. *Lloyd* (1913), 152 Wis. 24, 31-32, 139 N.W. 514.

Application of the above rules to Rizzo's case reveals a total failure of Rizzo to meet the test of even one of the above requirements for the following reasons:

(1) Rizzo's testimony concerning gambling activities in Kenosha county was not given under compulsion. Compulsion to testify under sec. 885.34, Stats., must be "by order of the court upon motion of the district attorney." Before Rizzo was asked about his Kenosha county activities the prosecutor specifically warned Rizzo that he would have no immunity on the following questions and the magistrate allowed him to confer with counsel. In addition, the order of the *court* compelled Rizzo to answer only questions about the Ogden Social Club in Milwaukee and about the murder of Tony Biernat. The order specified that other testimony would not be immune.

(2) Even if Rizzo had been compelled to answer questions about gambling in Kenosha county, none of

his testimony was incriminating. His testimony was that his memory failed him about practically all of his activities, but that he did know "Wheezer" Covelli, Frank Balestreri, and a few other people.

(3) In fact, none of Rizzo's testimony during the entire John Doe could be used as a basis for prosecuting him. The only testimony which would be incriminating was that he had gambled and "worked the stick" at the Ogden Social Club in Milwaukee more than six years previous to the hearing. But prosecution for that offense would surely be barred by the statute of limitations (sec. 939.74, Stats.), and as to questions about such crimes Rizzo could not rightfully claim the privilege. *Brown* v. *Walker,* supra.

(4) Rizzo never claimed his privilege as to questions about the Kenosha county activities and by answering he waived his right to claim immunity.

(5) Rizzo claims that his answers given under immunity were used as a link in the chain of evidence which supports the present prosecution. Yet no connection is apparent between Rizzo's previous gambling in Milwaukee and the present charges. Since there is no apparent connection, it is Rizzo's burden to show the court that a substantial connection could exist. Rizzo has offered nothing but the orbiting speculations of counsel.

Rizzo also contends that because gambling is a continuing activity any compelled testimony must necessarily bar Rizzo's prosecution on any gambling charges. Such is not the law. Assuming that Rizzo's compelled testimony would give him immunity for gambling offenses in Milwaukee prior to 1959, such immunity would not grant him a general amnesty which would defeat the very purpose of the John Doe investigation, which is to aid in

the prosecution of criminals. *Carchidi* v. *State, supra,* pp. 442, 443.

In addition, there is the venue statute which requires proof of the offense having been committed in a particular county.

We entertain some doubt as to whether this is a proper case in which to have invoked the extraordinary remedy of a writ of prohibition. The briefs of counsel do not touch upon this issue. We find it unnecessary to decide this point of jurisdiction inasmuch as we have reached the conclusion that there has been no showing to support the issuance of a writ of prohibition against Kenosha county court, Branch 2. It is not suggested that the relator may not raise the issue in his preliminary examination or in his trial at a proper time if the proof indicates that the rights accorded to him in compelling his testimony have been abused.

By the Court.—Order affirmed.

No. 122

August Term, 1966

State Of Wisconsin: In Supreme Court

State ex rel. John C. Rizzo,

Appellant

vs.

The County Court of Kenosha Co., Branch II, the Hon. Earl Morton, Judge of said Court Presiding Therein,

Respondent.

GORDON, J. (concurring) I reach the same result expressed in the majority opinion but do so only because upon this application for prohibition the record does not adequately establish that the answers made by the appellant under judicial compulsion furnished a link in the chain of evidence for the present prosecution.

I respectfully disagree, however, with the court's holding that it is the accused's burden to establish the connection. When the state compels a witness to forsake his constitutional privilege to remain silent, the question as to whether a subsequent prosecution is barred should depend on whether the evidence needed for the prosecution was triggered by the testimony given by him under compulsion. In my opinion, it is wrong to impose upon the witness the burden of proving such nexus. When the issue is raised by the accused, it is enough if there is a reasonable probability that the compelled answers furnish the link to the evidence needed for prosecution; it is the state which should then have the obligation of contradicting this. But cf. *State* v. *Lloyd* (1913), 152 Wis. 24, 32, 139 N.W. 514.

In *Counselman* v. *Hitchcock* (1892), 142 U.S. 547, 585, 12 Sup. Ct. 195, 35 L. Ed. 1110, it is stated:

> "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. . . .
>
> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."

The majority opinion states that none of Mr. Rizzo's "testimony during the entire John Doe" could qualify as a basis for his subsequent prosecution. This is a conclusion to which I cannot subscribe because I do not think it is sufficiently established by the record. It does not shock me to think that the compelled admissions as to gambling in Milwaukee and of his having been a "stick man" at a gambling place in Milwaukee could have produced the link needed for a later prosecution as to gambling in a neighboring community. Mr. Rizzo should have the right to raise this issue by way of a motion to quash, and if the trial court believes it reasonably probable that the compelled testimony produced the needed link in the chain of events, then the state should be required to show that the prosecution's case is not connected to the evidence which had been given by him under compulsion.

The majority opinion points out that the prosecutor specifically warned Mr. Rizzo that he would have no immunity as to subsequent questions and that the magistrate also informed him that his subsequent testimony would not be immune. In my opinion, it is inappropriate for this court to rely on those warnings; I believe them to be irrelevant. The test is whether the answers given under

compulsion supplied the necessary link for the subsequent prosecution; if they did, the attempted warnings of the prosecutor and the magistrate were ineffectual in depriving the witness of his immunity.

The court also concludes that Mr. Rizzo "never claimed his privilege as to questions about the Kenosha county activities and by answering he waived his right to claim immunity." In my opinion, this observation on the part of the court pre-supposes that there is no possible nexus between gambling in Milwaukee and subsequent gambling in Kenosha. It begs the question whether there is in fact a link between the testimony given under compulsion and the subsequent prosecution. One might fairly ask why in the Kenosha John Doe proceedings it was necessary to interrogate Mr. Rizzo concerning gambling in Milwaukee; the answer might well be that there was a tie-up between the gambling in the two localities. If the questions were in fact relevant to the Kenosha investigation and of sufficient importance to have warranted the giving of immunity, we should not foreclose the possibility of an evidentiary link.

I share the doubt expressed in the court's opinion that upon this record it was proper to proceed by way of an application for a writ of prohibition. However, Mr. Rizzo should not be barred from raising the question whether his Kenosha prosecution stemmed out of evidence garnered as a result of his insulated testimony. It is my belief that he should be free to raise such issue by a motion to quash without the impediment of the conclusions contained in the majority opinion to the effect that he has waived his privilege and that his testimony did not relate to gambling in Kenosha county.

I am authorized to state that Mr. Justice Beilfuss and Mr. Justice Heffernan join in this concurring opinion.

And afterwards, to-wit on the 31st day of January, A. D. 1967, the same being the 75th day of said term, the following proceedings were had in said cause in this Court:

State ex rel. John S. Rizzo,

Appellant,

vs.

The County Court of Kenosha County, Branch II, the Hon. Earl Morton, Judge of said court presiding therein,

Respondent.

ORDER

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in said cause, it is now here ordered that said motion be, and the same is hereby, denied without costs. Per Curiam opinion filed.

No. 122

August Term, 1966

State Of Wisconsin: In Supreme Court

State Of Wisconsin ex rel. John C. Rizzo,

Appellant,

vs.

The County Court Of Kenosha County Branch II, the Honorable Earl Morton, Judge of said Court Presiding Therein,

Respondent.

PER CURIAM (on rehearing) The appellant's brief on rehearing reargues the same issues presented upon appeal and especially the important question of whether the state has the burden of proving the evidence against the defendant was not obtained by means of his testimony given under immunity or whether the defendant has the burden to prove it was. As the court remains divided on this issue, the majority opinion stands. However, what was said as to the insufficiency of the evidence is not to foreclose the defendant from raising the question, or to be deemed *res adjudicata* of the issue, of whether the testimony he gave under immunity at the John Doe proceeding provided the link for the basis of the present prosecution pending in the county court of Kenosha county if the issue is raised in that proceeding. The language of the opinion is restricted to whether the writ of prohibition should have issued on the facts presented.

APPENDIX C

Transcript of material parts of testimony taken at the John Doe hearing of October 7, 1964, before the Honorable Harry V. Carlson, County Judge, acting as Magistrate.

JOHN CHARLES RIZZO, called on behalf of the State, testified as follows:

Direct Examination.

By Mr. LeRoy Dalton, Assistant Attorney General, Representing The State of Wisconsin:

Q. Your occupation?

A. I refuse to answer on the grounds it might incriminate me.

Q. Mr. Rizzo, have you ever worked in Milwaukee?

A. I refeuse to answer on the ground it might incriminate me.

Q. Were you ever connected with the Ogden Social Club in Milwaukee?

A. I refuse to answer on the grounds it might incriminate me.

Q. Did you ever pay any money to Milwaukee police officials to operate the Ogden Social Club?

A. I refuse to answer on the grounds it might incriminate me.

Q. Do you have any knowledge regarding the murder of Tony Biernat?

A. I refuse to answer on the grounds it might incriminate me.

Q. Have you ever paid any money directly or indirectly to any public official in Kenosha County?

A. I refuse to answer on the grounds that it might incriminate me.

Abridged transcript of material parts of proceedings taken at the hearing on October 13, 1964, before the Honorable Harry V. Carlson, County Judge, Branch II, presiding.

LeRoy Dalton, assistant attorney general, appearing for the State of Wisconsin, Dominic H. Frinzi and Nicholas C. Catania appearing for John Charles Rizzo, the witness.

Mr. Dalton: This is a proceeding for requiring a witness to answer certain questions under a grant of immunity pursuant to Section 325.34 of the Wisconsin Statutes.

The witness was asked three questions to which he refused to answer because of possible self-incrimination:

(1) Did you ever have any connection with the Ogden Social Club in Milwaukee?

(2) Did you ever pay any money to Milwaukee police officials to operate the Ogden Social Club?

(3) Whether you had any knowledge regarding the murder of Tony Biernat?

Mr. Frinzi: * * * The question did you ever have any connection with the Ogden Social Club in Milwaukee, assuming that a crime is being investigated in another county I don't believe the venue or jurisdiction of this Court extends to another county.

Mr. Dalton: During the investigation many things came up which relate to the activities in the county where the investigation is taking place. * * * I don't think at this point we are required to show what the connection is between the questions asked here and the criminal activity being investigated in this county.

Mr. Catania: * * * Another point, your honor, if immunity is to be granted, the 325.34 is the general immunity statute. I don't see any purpose in restricting

ourselves to one, two, or three questions. If he is given immunity, he is given immunity period. * * * I think that if the witness is required to answer that he is extended general immunity.

Mr. Dalton: We couldn't possibly grant general immunity. My request for immunity includes three subjects, first of all any connection he had with the Ogden Social Club; secondly, any payoffs to the Milwaukee Police Department; third, any knowledge he had about the Biernat case. Those are the three subjects.

* * *

By The Court: But questions may relate to Salt Lake City before this particular proceeding in Kenosha County and that, as long as it is connected with the investigation and the John Doe proceeding.

* * *

By The Court: Counsel knows that it is my understanding that this immunity covers these subjects and comlimentary and supplementary questions related only to that subject matter and not involved in other criminal offenses.

Abridged transcript of material parts of testimony taken at the John Doe hearing on October 13, 1964, before the Honorable Harry V. Carlson, County Judge, Acting as a Magistrate.

JOHN CHARLES RIZZO testified as follows:

I used to play dice and cards for money at the Ogden Social Club in Milwaukee. The last time I played there was better than six years ago.

* * *

I never took part in the management of the Ogden Social Club. I have gone in places. If I'm not playing,

I may go there and work on the stick and help out. A guy named Maurie was in charge of the Ogden Social Club.

• • •

Joe Gags used to be around there. I don't know whether he had any part in the management.

• • •

I did not have any business connections with Frank Balistreri. A long time ago I met Phil Alderisio in Milwaukee.

• • •

It is possible but I don't know whether I've ever sat down and had drinks and ate with Phil Alderisio.

• • •

To my knowledge Frank Balistreri did not have any connection with the Ogden Social Club. I have never been in a position to hire anyone to work there. I don't remember ever making payments of any kind to officials of the Milwaukee Police Department to operate the Ogden Social Club. I never had any reason to as far as I can remember. I have no knowledge of money or gifts being given directly or indirectly to members of the Milwaukee Police Department. I have no knowledge regarding the murder of Tony Biernat.

• • •

"Weezer" Covelli and I have gone to Milwaukee together.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 1193

STATE OF WISCONSIN
EX REL. JOHN C. RIZZO,

Petitioner,

vs.

THE COUNTY COURT OF KENOSHA COUNTY
BRANCH II, THE HONORABLE EARL
MORTON, JUDGE OF SAID COURT
PRESIDING THEREIN,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 1193

STATE OF WISCONSIN
EX REL. JOHN C. RIZZO,

Petitioner,

vs.

THE COUNTY COURT OF KENOSHA COUNTY
BRANCH II, THE HONORABLE EARL
MORTON, JUDGE OF SAID COURT
PRESIDING THEREIN,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

STATEMENT OF CASE

Petitioner, John C. Rizzo, is charged in the Circuit Court of Kenosha County, Wisconsin, with the crime of operating a gambling game which is alleged to have taken place in Kenosha County, Wisconsin, during the period between January 1, 1960, and January 28, 1963. Prior to his having been charged with this offense, he had been interrogated by a magistrate in Kenosha County in a proceeding pursuant to Sec. 945.025, Wis. Stats. This is in essence a one-man grand jury proceeding. In his appearance before the magistrate, he refused on the grounds of

self-incrimination to answer two questions relating to the Ogden Social Club in the City of Milwaukee, Milwaukee County, Wisconsin, and a third as to whether or not he had any knowledge regarding the murder of one Tony Biernat which had taken place in Kenosha County. The questions were certified to the County Court of Kenosha County, and the court ordered him under the provisions of Sec. 325.34 (now Sec. 885), Wisconsin Statutes, the immunity statute, to answer these questions.

Subsequently, John C. Rizzo was charged with violation of Sec. 945.03 (1), Wisconsin Statutes, and before a preliminary hearing could be held on September 30, 1965, before the Honorable Earl Morton, County Judge of Kenosha County, Wisconsin, Rizzo filed a petition for an alternate writ of prohibition with the Circuit Court of Kenosha County, Wisconsin. The petition (Respondent's Appendix A) alleges that Rizzo was subpoenaed and appeared before the Honorable Harry V. Carlson, Judge of County Court, and that he refused to answer certain questions on the grounds that his answers would tend to incriminate him; that thereafter he was "granted immunity" from criminal prosecution, and notwithstanding such grant of immunity, was subsequently prosecuted for violation of Sec. 945.03 (1), Wis. Stats.

There is no allegation in the petition that the crime for which he is being prosecuted is the same crime about which he was forced to testify before Judge Carlson. Nor is there an allegation that there is any connection between the two matters or that his compelled answers provided a link to evidence to be used against him in the charges pending against him.

After a hearing on the alternate writ of prohibition, the Circuit Court of Kenosha County denied the writ of prohibition and granted an order for a writ of consultation directing that the preliminary hearing proceed in County Court. Petitioner then appealed to the Supreme Court of the State of Wisconsin, which affirmed the Circuit Court denial of the writ of prohibition. On a rehearing application in a *per curiam* decision, the Wisconsin Supreme Court stated that its original opinion is "restricted to whether the writ of prohibition should have been issued on the facts presented". The court further indicated that the defendant was not foreclosed from raising the question of whether the testimony he gave under immunity provided a link to evidence which forms the basis of his present prosecution.

REASONS FOR DENYING WRIT

Petitioner has never been tried for the crime with which he is charged, and the decision of the Wisconsin Supreme Court guarantees to him the right to contest at his trial the reception of any evidence which was obtained by virtue of the answers which he gave under compulsion. With these protections, it would seem unwarranted for this court to review the case at this time on certiorari since the decision of the Wisconsin Supreme Court is not a final adjudication of the issue within the meaning of 28 U. S. C. 1257 (3), *Arceneaux v. Louisiana* (1964), 376 U. S. 336.

In seeking a writ of prohibition, it was the position of petitioner that having been granted immunity as to three specific questions, two of them relating to gambling, he is entitled as a matter of law to be free from any prosecu-

tion relating to gambling, wherever and whenever committed.

Petitioner also suggests in his petition to this court that there may be some connection between the gambling activities which he testified to under compulsion and the gambling violations with which he is presently facing criminal charges in the County Court of Kenosha County. However, *no such allegation appears in the record.* The Wisconsin Supreme Court in its decision pointed out that the record did not support any suggestion that the answers Rizzo gave under compulsion were used as a link in the chain of evidence which supports the present prosecution. As the court said:

> "Yet no connection is apparent between Rizzo's previous gambling in Milwaukee and the present charges. Since there is no apparent connection, it is Rizzo's burden to show the court that a substantial connection *could* exist. *Rizzo has offered nothing but the orbiting speculations of counsel.*" (Emphasis supplied.) (App. 15)

Even the concurring opinion of Justice Gordon points out that the record before the court did not establish that the answers made by Rizzo under compulsion furnished a link in the chain of evidence for the present prosecution. (App. 17)

On motion for rehearing a *per curiam* memorandum stated in part:

> "However, what was said as to the insufficiency of the evidence is not to foreclose the defendant from raising the question, or to be deemed *res adjudicata* of the issue, of whether the testimony he gave under im-

> munity at the John Doe proceeding provided the link for the basis of the present prosecution pending in the county court of Kenosha county if the issue is raised in that proceeding. The language of the opinion is restricted to whether the writ of prohibition should have issued on the facts presented." (App. 21)

The petitioner herein asks that this court review the denial of the writ of prohibition by the Supreme Court of the State of Wisconsin. In effect the petitioner is asking this court to supersede the judicial processes of the State of Wisconsin on the pretext that a federal constitutional question may become involved at some future time in connection with the use of evidence obtained in violation of the petitioner's Fifth Amendment rights.

Such position is premature. The Wisconsin Supreme Court in its decision has clearly indicated that any evidence obtained directly or indirectly as a result of Rizzo's compelled answers could not be used against him. The decision preserves the right to the petitioner to challenge any testimony offered in his preliminary examination or trial on the commercial gambling charge which he may claim or suspect was obtained by virtue of his compelled answers.

Nor is petitioner denied the right to make motions to the court to force the state to disclose the source of its evidence against him and to demonstrate that such evidence was not obtained through a link arising from the answers given by Rizzo under compulsion.

Petitioner cites *Counselman v. Hitchcock* (1892), 142 U. S. 547, 585, 12 Sup. Ct. 195, 35 L. Ed. 1110:

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."

At Page 586 of the same opinion the court said:

"In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution *for the offense to which the question relates.*" (Emphasis supplied.)

The state concedes that the rationale of the *Counselman* case would be extended to cover answers which would furnish a link in the chain of evidence needed to prosecute, as this court has pointed out in *Malloy v. Hogan* (1964), 378 U. S. 1, and *Hoffman v. United States* (1951), 341 U. S. 479. However, that question is not before the court.

Finally, the petitioner relies upon *Brown v. Walker* (1896), 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819, by lifting out of context from Page 601 of that opinion a sentence which describes immunity as an act of "general amnesty". Apparently petitioner would construe this language to mean that this amnesty applies to all crimes of the type the witness is compelled to testify about. In other words, if the witness testifies about any type of gambling, he is forever immune from prosecution for any gambling offense. Thus petitioner would claim that his admissions that he played dice and cards for money and worked the stick at the Ogden Social Club in Milwaukee more than six years previous to the hearing, would act as a general grant of immun-

ity or amnesty for all of his gambling activities wherever they took place. This despite the fact that the playing of dice and cards for money, a misdemeanor, where the statute of limitations is three years, and "working the stick", a possible felony, were barred by the statute of limitations. (App. 15) See *Brown v. Walker*, supra, Page 598.

In reply to the final paragraph of the petition, we merely point out again that this record is barren of any indication that the investigation being conducted before Judge Carlson at the time of Rizzo's testimony under compulsion had any connection with the charges which the petitioner presently faces in Kenosha County Court.

CONCLUSION

The petitioner has failed to allege in his original papers that the crime for which he is being prosecuted is the same crime about which he was compelled to testify before Judge Carlson; he has failed to allege that there is any connection between his compelled testimony and the criminal charges he now faces; he has failed to allege that his compelled answers provided a link to evidence to be used against him in the pending charges. Since the decision of the Wisconsin Supreme Court is not a final adjudication of the issue and the petitioner will have an opportunity at the preliminary hearing and the trial to establish any connection between his compelled testimony and the

evidence used against him, the petition for certiorari in this court is premature.

Respectfully submitted,

BRONSON C. LA FOLLETTE
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State Capitol
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Counsel for Respondent

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PETITION FOR AN ALTERNATE WRIT OF PROHIBITION
(Formal Parts Omitted)

TO THE HONORABLE CIRCUIT COURT JUDGE OF KENOSHA COUNTY, STATE OF WISCONSIN:

Now comes John C. Rizzo and respectfully represents and shows to the court as follows:

1) That he is the defendant in the case of the State of Wisconsin vs. John C. Rizzo, wherein he is charged with violating Section 945.03 (1) of the Wisconsin Stats. and that said matter is scheduled for a preliminary hearing on September 30, 1965 at 10 A. M. before the Honorable Earl Morton.

2) That on October 7, 1964, your petitioner was subpoenaed to attend and give testimony before the Honorable Harry V. Carlson, County Judge, County Court, Branch II in a proceeding pursuant to Sec. 954.025 Wisconsin Stats.

3) That on October 13, 1964, your petitioner appeared before the Honorable Harry V. Carlson, County Judge, County Court, Branch II, pursuant to said subpoena.

4) That pursuant to said subpoena your petitioner was sworn on oath, certain questions were asked of him, the answers to which he refused to give, on the ground that his answers may have tended to incriminate him.

5) Whereupon your petitioner was granted immunity from criminal prosecution pursuant to Sec. 325.34 of the Wisconsin Stats., and after said grant of immunity your

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petitioner gave truthful answers to the questions put to him.

5 6) That pursuant to said grant of immunity your petitioner testified to violations of Chapter 945 of the Wisconsin Stats.

7) That notwithstanding said grant of immunity, your petitioner is being prosecuted for an alleged violation of Sec. 945.03 (1) of the Wisconsin Stats. in violation of the protection afforded your petitioner by Sec. 325.34 of the Wisconsin Stats. and the Wisconsin and United States Constitutions.

Your petitioner hereby informs and gives the Court now here to understand that the said County Court of Kenosha County, Branch II, and the Honorable Earl Morton, presiding Judge of said Court, has entertained, now entertains and will threaten to proceed with certain proceedings wholly unwarranted by law and beyond the rightful jurisdiction of said Court and Judge thereof; and that the said Court threatens to restrain your petitioner of his personal liberty and injuriously to usurp powers and authorities contrary to the Constitution and laws of the State of Wisconsin, to the injury of the State of Wisconsin and its sovereignty and contrary to the United States Constitution, the Wisconsin Constitution, the laws of the United States and the laws of the State of Wisconsin.

And thereupon your petitioner moves the Court to order and direct the issuance of its alternate writ of prohibition, to the County Court of Kenosha County, Branch II and to the Honorable Earl Morton, presiding Judge, com-

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manding him to desist and refrain from any further proceedings in the matter specified in this petition until some day to be fixed by the Court in the said writ named, and further order of the Court thereupon, and then to show cause why he should not be absolutely and permanently restrained and prohibited from any further proceedings in said matter.

/s/ JOHN C. RIZZO
John C. Rizzo

Affidavit of John C. Rizzo (Not Printed)

CERTIFICATE OF SERVICE

I, Bronson C. LaFollette, Attorney General of Wisconsin, a member of the Bar of this Court, hereby certify that I have this day served the foregoing Respondent's Brief Opposing Petition for Writ of Certiorari upon the Counsel of Record for the Petitioner herein, by mailing a copy thereof with first class postage prepaid, addressed as follows:

Dominic H. Frinzi
Attorney at Law

161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Dated this 21st day of April, 1967.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

Counsel of Record for Respondent